43330
EB

SERVICE DATE – DECEMBER 20, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY
– CONTROL AND MERGER –
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Decision No. 106

Digest: [1] This decision denies a request from BNSF Railway Company and G3 Enterprises (G3) that the Board order access to the G3 facility in Modesto, Cal., by reinstating reciprocal switching via the shortline railroad Modesto and Empire Traction Company, which had such access when the facility was owned by Proctor & Gamble because the facility was not a "2-to-1" location and UP had not failed to live up to its representations as a part of the UP/SP merger.

Decided: December 19, 2013

On September 13, 2012, BNSF Railway Company (BNSF) and G3 Enterprises (G3) filed an amended joint petition for enforcement of the Board's decision in Union Pacific Corporation – Control and Merger – Southern Pacific Rail Corporation (Decision No. 44), 1 S.T.B. 233 (1996). Petitioners ask the Board to direct Union Pacific Railroad Company to "restore" competitive rail service to a G3 facility (formerly a Proctor & Gamble (P&G) facility) located at 2612 Crows Landing Road, Modesto, Cal. (UP station of Rogers), by reinstating the facility as open to Modesto and Empire Traction Company (MET) for reciprocal switching to and from BNSF or by another appropriate remedy.[2] BNSF and G3 claim they are entitled to the reinstatement of reciprocal switching at the G3 facility as a result of the conditions imposed in Decision No. 44. For the reasons set forth below, the Board will deny the BNSF/G3 petition.

---

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] See BNSF/G3 Amended Pet. 1-3, Sept. 13, 2012.

BACKGROUND

The UP/SP Merger

In Decision No. 44, the Board approved the common control and merger of the rail carriers controlled by the Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) (collectively UP) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) (collectively SP), subject to various conditions. Common control was consummated on September 11, 1996.

In approving the UP/SP merger, the Board imposed conditions, of which a major aspect was the "BNSF Agreement", which was intended to ameliorate the competitive harms an unconditioned merger would present and to protect 2-to-1 shippers.[3] The BNSF Agreement permitted BNSF to replicate, to a large extent, the competitive service that was lost when SP was absorbed into UP.[4] Specifically, the Board explained that the "BNSF agreement permits BNSF to serve all shippers who would otherwise go from two directly serving carriers to one."[5] The BNSF Agreement included an omnibus clause to protect the relatively few 2-to-1 points not explicitly identified and covered by the Board's grant of trackage rights, line sales, and the terms of the agreement.[6]

The Board also recognized, in the course of considering the UP/SP merger application, that the applicants had made numerous representations that certain points would be covered and certain services would be provided after the UP/SP merger.[7] A number of those representations related to the terms of the BNSF Agreement.[8] The Board stated that UP and SP must adhere to all merger-related representations.[9]

Petition and Argument of BNSF and G3

Petitioners state that G3 purchased the Modesto, Cal., warehouse facility from P&G in June 2001.[10] G3 states that, since then, it has invested $29 million in the Modesto facility,

---

[3] Decision No. 44, 1 S.T.B. at 247 n. 15 (describing the BNSF Agreement).

[4] Id. at 368.

[5] Id. at 368.

[6] Id. at 252.

[7] Id. at 246 n. 14.

[8] Id.

[9] Decision No. 44, 1 S.T.B. at 246 n. 14.

[10] BNSF/G3 Amended Pet. at 3, Sept. 13, 2012.

adding an additional 1.5 million square feet of warehouse space.[11] G3 states that access to competitive rail service was very important in its search for a warehouse facility and that P&G had told it that the property was dual-served, as evidenced by a 2001 UP tariff.[12] BNSF and G3 assert that UP did not close the facility to reciprocal switching until 2011, when it removed P&G from the list of open facilities, which was 10 years after G3 acquired it and began operations.[13] BNSF and G3 state that on March 1, 2012, after closing the facility to reciprocal switching, UP denied BNSF's February 6, 2012 notice of intent to serve the facility.[14]

As noted, on September 13, 2012, BNSF and G3[15] filed an amended joint petition for enforcement of Decision No. 44.[16] In support of their petition, they submitted a letter dated November 21, 1995, in which the President of MET, James L. Beard, expressed concerns that, with the loss of competition between UP and SP following their merger, the incentive to maintain open switching in Modesto, Cal., would disappear, to the detriment of MET and local shippers.[17] MET sought assurances that the switching districts open to MET would not be changed following the UP/SP merger.[18] Relying upon UP's December 13, 1995 letter in response, BNSF and G3 allege that UP represented to MET that, if the merger were approved, UP had no intention of diminishing the switching district of Modesto, Cal., and no intention of closing UP's present open customers specifically named in the attached tariff.[19] BNSF and G3 argue that the UP tariff attached to the response letter confirmed that the P&G facility was within the Modesto switching district and was, at the time of the UP/SP merger, a present and open customer of UP.[20] BNSF and G3 contend that UP has failed to adhere to its representations,

---

[11] Id. at 4.

[12] Id. at 4-5, Ex. A, Sept. 13, 2012.

[13] Id. at 5, Ex. E.

[14] Id. at 5, Ex. F, and Ex. G. BNSF's letter notifying UP of its intent to "restore" competitive service was made under the BNSF Agreement's omnibus clause. (See id. at Ex. F.)

[15] G3 provides a variety of products and services for its customers in the wine and spirits industries. Operations at the Modesto, Cal., facility include label manufacturing, bottling, co-packing, general warehousing, leasing warehouse space to third party logistics providers, and boxcar/intermodal/truck transportation. (BNSF/G3 Amended Pet. 4, Ex. B, Sept. 13, 2012.)

[16] BNSF and G3's initial petition for enforcement was filed on September 4, 2012.

[17] BNSF/G3 Amended Pet. 3, Ex. B, Sept. 13, 2012. Prior to the UP/SP merger, MET connected directly to both the UP and SP lines in Modesto and conducted interchanges for local shippers to their BNSF connection. (Id.) MET did not participate in the UP/SP merger proceedings.

[18] Id. MET's concern was that "the loss of competition between the UP and SP" would eliminate the "incentive to maintain open switching at Modesto."

[19] Id. at 3, Ex. C (UP Letter to MET President James L. Beard and attached UP tariff).

[20] Id. at 3.

maintaining that when it removed the Modesto, Cal., facility from its list of open customers, UP diminished the Modesto switching district.[21]

BNSF and G3 further argue that UP's actions are contrary to Decision No. 44 and the key issues the Board considered in approving the merger.[22] BNSF and G3 state that UP has arbitrarily eliminated all competition for a facility that had access to multiple carriers prior to the merger.[23] They argue that the pre-merger situation at the facility was a 3-to-2 scenario, but that UP's actions have created a 3-to-1 scenario by eliminating SP (via the 1996 merger) and BNSF (via termination of the reciprocal switch with MET in 2011) as competitive alternatives.[24]

Reply and Argument of UP

UP, in its September 20, 2012 reply to the BNSF and G3 amended joint petition for enforcement, points out that its pre-merger switching tariff was customer-specific, i.e., it named P&G, rather than the facility, as the beneficiary of the reciprocal switch. It maintains that, because G3 was not a specifically named customer at the time of the merger, UP has not violated its representations to MET.[25] UP argues that its representations to MET did not obligate UP to treat G3 as open: because G3 was never an open customer, UP did not close G3 to reciprocal switching.[26] UP also states that its records show that no traffic has moved to or from the G3 facility via reciprocal switching.[27] Furthermore, UP argues that it did not represent to MET that G3 would be open to reciprocal switching, because it was not listed as a present and open customer in the tariff attached to UP's response to MET's pre-merger letter.[28]

According to UP, G3 did not become a successor to P&G with regard to status as an open customer by purchasing the facility in June 2001.[29] UP maintains that its tariffs and reciprocal switching circulars make clear that an open or closed status is determined on a customer-specific basis.[30] UP asserts that this customer-specific approach to reciprocal switching is consistent with the rail industry's accepted practices.[31] UP states that G3 is a sophisticated entity that engaged in the purchase of property and that due diligence would have revealed that the reciprocal switching

---

[21] Id. at 6.

[22] BNSF/G3 Amended Pet. 6, Sept. 13, 2012.

[23] Id. at 7.

[24] Id.

[25] UP Reply 8, Sept. 20, 2012.

[26] Id. at 2, Ex. B.

[27] Id. at 6.

[28] Id. at 8.

[29] Id.

[30] Id.

[31] UP Reply 9, Sept. 20, 2012.

status of P&G at the facility was exclusive to P&G.[32] UP maintains that its treatment of G3 as a closed customer does not reflect a merger-related reduction in competition.[33] Rather, UP states that G3 purchased the facility after the merger, and therefore it was a closed customer at the time of acquisition, and it remains so today.[34]

UP also maintains that G3's closed status has no effect on the size of UP's Modesto switching district.[35] UP argues that MET's letter represented MET's concern that a change in the size of the switching district "…might reduce the number of customers that could pay an intra-terminal or inter-terminal switching charge to move traffic between UP or SP served facilities in the Modesto switching district and MET-served facilities in the Modesto switching district."[36]

Oral Argument

On January 15, 2013, the Board held oral argument where BNSF and G3 argued that "in the [UP/SP] merger, [UP] committed to the public and the Board, and the Board ordered the preservation of, two-carrier rail competition at all locations, where otherwise a shipper facility would lose all of its pre-merger competitive options, other than the merged [UP/SP]."[37] Thus, BNSF and G3 argue, UP's actions in closing the G3 facility to reciprocal switching are contrary to Decision No. 44 and eliminate competition at a location that enjoyed three carrier service prior to the merger.[38] G3 acknowledged that it had not attempted to use reciprocal switching since it purchased the facility in 2001.[39] G3 stated that it received confirmation from the seller, P&G, that the facility was dual served and that it understood that MET had confirmed the facility was open to dual service as a condition of the merger.[40] G3 nevertheless acknowledges that "[i]n hindsight … it would have been prudent to confirm reciprocal switching with UP."[41]

In response to Board member questions at the oral argument, BNSF and G3 acknowledged that, while MET had access to both closed and open facilities in Modesto, no facilities in the Modesto switching district were 2-to-1.[42] Petitioners further explained that pre-

---

[32] Id. at 10.

[33] Id. at 11.

[34] Id.

[35] Id. at 10

[36] Id. at 10-11.

[37] Oral Argument Tr., 6, Jan. 15, 2013.

[38] Id. at 8.

[39] Id. at 12.

[40] Id. at 11.

[41] Id.

[42] Id. at 15-16, 28-30. At oral argument, UP concurred that no Modesto facilities were classified as 2-to-1 pre-merger. (Oral Argument Tr., 38, 54-55, Jan. 15, 2013.)

merger, the P&G facility was directly served by only one carrier, UP.[43] Petitioners argued that direct service by only one carrier and otherwise via reciprocal switching "does not diminish, in any way its right to access under the merger agreement."[44] Petitioners maintained that these rights run with the land and not with a specific shipper.[45] BNSF and G3 argued that because the G3 facility had competition pre-merger, the facility is entitled to competition in perpetuity as a result of the conditions imposed in the UP/SP merger.[46]

BNSF and G3 highlighted UP's pre-merger representations made "to the effect that existing competition will be preserved, in fact, enhanced in a number of situations."[47] BNSF and G3 argued that their representations argument was an alternative theory of relief that should be read broadly.[48] Yet BNSF and G3 conceded that UP had lived up to its written representations to MET.[49]

In response, UP stated that it had never made representations to G3 or MET that shippers similarly situated to G3 would be open to reciprocal switching.[50] UP argued that the merger did not require UP to open shippers like G3 to reciprocal switching, because G3 did not own the facility in question at the time of the merger and therefore did not realize a loss of competition.[51]

UP also asserted that P&G did not lose competition as a result of the merger.[52] UP maintained that after the merger, P&G remained open to reciprocal switching via MET.[53] UP argued that P&G enjoyed the same level of competition as it did pre-merger and would continue to do so as long as it remained at that facility.[54] UP explained that, in the Modesto area before the merger, when SP was a competitor, some shippers were open and others were closed.[55] UP asserted that this status was a result of each shipper's specific circumstances.[56] UP maintained

---

[43] Id. at 17, 21.

[44] Id. at 21.

[45] Id.

[46] Id. at 26.

[47] Id. at 22.

[48] Oral Argument Tr., 24-25, Jan. 15, 2013.

[49] Id. at 27-28, and infra n.65.

[50] Id. at 32.

[51] Id.

[52] Id. at 36.

[53] Id. at 33-34.

[54] Oral Argument Tr., 36, Jan. 15, 2013.

[55] Id.

[56] Id.

that is why its tariff names specific shippers as open to reciprocal switching rather than using a broad geographic definition.[57]

Cal Freight & E. & J. Gallo Winery Letters

On January 11, 2013, the Board received letters in support of the BNSF/G3 amended petition from Cal Freight and E. & J. Gallo Winery (Gallo). On January 18, 2013, UP filed a response in opposition to the Gallo and Cal Freight letters. On January 25, 2013, BNSF and G3 submitted a letter objecting to UP's letter and requesting that the Board close the record at the end of the oral argument.[58] The Board will accept all filings into the record in this proceeding in the interest of compiling a more complete record.

DISCUSSION AND CONCLUSIONS

The Board will deny the BNSF/G3 amended joint petition requesting that, pursuant to Decision No. 44, UP open the G3 facility to reciprocal switching via MET. The Board finds that the BNSF/G3 petition fails to state a claim for which the requested relief may be granted.

Decision No. 44. BNSF and G3 request relief on the ground that UP's actions are contrary to Decision No. 44.[59] BNSF and G3 state that "one of the key issues that [the Board] considered in evaluating the potential competitive harm that would result from the proposed UP/SP merger was whether the BNSF settlement agreement would allow BNSF to serve all shippers whose direct access to rail service would go from two railroads to one."[60] BNSF and G3 rely on this statement to argue that, while the pre-merger facility was a 3-to-2 scenario, UP's subsequent actions in removing the G3 site from reciprocal switching access have created a 3-to-1 post-merger scenario,[61] creating the same competitive concerns as a 2-to-1 scenario.[62]

The Modesto facility at the time of the merger was physically served by only one rail line, the line owned by UP. Indeed, the petitioners acknowledged that the Modesto facility was not a 2-to-1 point and that the Modesto district was not a 2-to-1 location.[63] The BNSF Agreement was adopted and expanded as a condition of the UP/SP merger to allow BNSF to preserve competition for 2-to-1 shippers.[64] Extending the competitive protections of the BNSF Agreement to a non-2-to-1 shipper at a non-2-to-1 location would effectively increase rather than

---

[57] Id. at 37.

[58] Id. at 2.

[59] BNSF/G3 Pet. 6, Sept. 13, 2013.

[60] Id. at 6.

[61] Id. at 7.

[62] Oral Argument Tr. 23, Jan. 15, 2013.

[63] Id. at 15-16, 28-29.

[64] Decision No. 44, 1 S.T.B. at 368.

preserve the pre-merger level of competition in Modesto. BNSF and G3 have failed to prove that there is sufficient connection between the alleged decrease in access to rail service and the UP/SP merger. Indeed, if the merger had never occurred, UP could have terminated the reciprocal switch at its discretion. BNSF/G3 have thus made no showing that UP's actions are contrary to Decision No. 44 or that the harm alleged is a direct result of the UP/SP merger.

The Representations Argument. The BNSF/G3 amended joint petition requests relief on two grounds. First, as petitioners point out, UP's letter to MET represented that UP had no intention of closing to reciprocal switching any of UP's open customers as listed in its then-current switching tariff. The tariff, however, specifically identified those customers who were, at the time of the UP/SP merger, open to reciprocal switching,[65] and G3 was not one of those customers. The tariff listed P&G, the previous owner of the Modesto facility, as open to reciprocal switching, and if P&G were still on the property, UP would be required to keep P&G open to reciprocal switching. UP's undisputed point is that G3 has never been listed on UP's reciprocal switching circular as open for reciprocal switching. BNSF and G3 argue that UP's failure to remove P&G from its reciprocal switching circular until approximately June 2011 demonstrates G3's open status and UP's failure to adhere to its merger-related representations. But UP presumably had no need to remove P&G from its reciprocal switching circular, or to consider whether G3 was entitled to reciprocal switching, during a period when neither P&G nor G3 had sought rail service. UP's failure to change its tariff during a period of complete inactivity does not establish that G3 should be open to reciprocal switching, or that UP has failed to adhere to its merger-related representations.

At oral argument, the petitioners conceded the weakness of their representations argument by acknowledging that the representations to MET were carefully crafted and that UP had technically adhered to them.[66] The precise text of both MET's inquiry letter and UP's response, the insufficiency of the petitioners' tariff removal argument, and the concession made during oral argument persuade us that UP's closing of G3's facility to reciprocal switching is not, on its face, inconsistent with UP's pre-merger representations to MET.

Second, petitioners ask the Board to require UP to adhere to the pre-merger representations it made to MET,[67] in particular, that it had no intention of diminishing the Modesto, Cal., switching district.[68] But as UP points out, both the SP and UP tariffs provided a

---

[65] BNSF/G3 Petition, Ex. C, Sept. 13, 2012.

[66] Oral Argument Tr. at 27-28. "[T]he letters have their pluses and minuses, and you can interpret those as you want, and … they did carefully craft [the letter to MET]. With intent, I don't know, but it was pretty carefully crafted. But we say fine, they live up to the representations, fine. That's not the issue. The issue here is access to this facility in perpetuity." (Id.)

[67] BNSF/G3 Amended Pet. 6, Sept. 13, 2012. See also id. at Ex. C (Dec. 13, 1995 letter to MET); Decision No. 44, 1 S.T.B. at 246 n. 14 (requiring UP/SP to adhere to all of their merger related-representations).

[68] BNSF/G3 Amended Pet. Ex. C, Sept. 13, 2012.

geographical definition of the Modesto switching district,[69] which remains intact. The fact that the G3 facility is located within the Modesto switching district does not necessarily mean that it is entitled to reciprocal switching, because UP defines switching districts by stations,[70] and not by the reciprocal switching status of customers within those districts.[71] While it may be true that UP had previously opened the then-P&G facility to reciprocal switching on a voluntary basis pre-merger, UP specifically offered continuation of the arrangement only to P&G. Because the switching obligation expressly ran to P&G, and not to the property itself, UP was under no stated obligation to continue to keep the Modesto facility open to reciprocal switching, once P&G sold the facility five years after the merger. Based on this record, we cannot find that BNSF and G3 have proven that G3's closed status has resulted in diminution of the Modesto switching district.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The BNSF/G3 amended joint petition for enforcement of Decision No. 44 is denied.

2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

---

[69] Id. at Items 10815 and 1233.

[70] Prior to 2001 UP defined the limits of its switching districts by physical landmarks. After 2001 it has defined switching districts by stations. (UP Reply Sanford V.S. 2, Sept. 20, 2012.) It is undisputed that the G3 facility is within UP's Modesto switching district. UP states that "all customers at a designated station or group of stations are in the same switching district, regardless of their reciprocal switching status." (Id. at 7.)

[71] UP Reply 7, Sept. 20, 2012.